Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**)**	
	)	
Petition of the Verizon Telephone Companies	**)**	**WC Docket No. 06-172**
For Forbearance Pursuant to 47 U.S.C. § 160(c)	**)**	
In the Boston, New York, Philadelphia,	**)**	
Pittsburgh, Providence, and Virginia Beach	**)**	
Metropolitan Statistical Areas	**)**	

COMPTEL REPLY COMMENTS

COMPTEL hereby submits its reply comments on Verizon's Petitions for Forbearance from dominant carrier and unbundling obligations in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach MSAs. The commenters present persuasive arguments as to why the Commission should deny each and every one of Verizon's Petitions. It should not be lost on the Commission that Verizon was unable to enlist any support for its position that forbearance is warranted. Oppositions were filed not only by Verizon's competitors in the six markets, but also by the City of Philadelphia, the City of New York, the Pennsylvania Public Utility Commission, the Delaware Public Service Commission, the Virginia State Corporation Commission, the National Association of State Utility Consumer Advocates, the Massachusetts Office of Attorney General and the Virginia Office of Attorney General, the Connecticut Office of Consumer Counsel, the Pennsylvania Office of Consumer Advocate, the Public Utility Law Project of New York, the Maryland Office of People's Counsel, the New Jersey Division of Rate Counsel and the New Hampshire Office of Consumer Advocate (collectively "NASUCA").

All of these commenters have demonstrated that granting Verizon forbearance from dominant carrier and unbundling regulation will limit, rather than enhance, competition and will be detrimental to consumers. Verizon's claims with respect to the extent of competition that currently exists in the six MSAs are exaggerated and its failure to address the availability of alternative providers on a wire center by wire center basis is fatal to its Petitions. Most significantly, Section 10(d) of the Act bars the Commission from granting forbearance from Section 251(c) because Verizon has not shown that Section 251(c) has been fully implemented in the six MSAs.

I. The Commission Cannot Find That 47 U.S.C § 251(c) is Fully Implemented

As noted by Cavalier, the Commission is barred by statute from granting Verizon's request for forbearance from Section 251(c) at this time.[1] Section 10(d) of the Communications Act, 47 U.S.C.§160(d), provides that the Commission may not forbear from applying the requirements of Sections 251(c) or 271 until it "determines that those requirements have been fully implemented." These are the only two sections of the statute for which full implementation is a precondition to the grant of forbearance. In the *Omaha Forbearance Order,* the Commission stated that this precondition is met "because the Commission has issued rules implementing section 251(c) and those rules have gone into effect."[2] This position, however, is inconsistent with the statutory language as well as Commission precedent.

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1 Opposition of Cavalier at 5-8.

2 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area,* WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170. at ¶53 (rel. Dec. 2, 2005), *aff'd sub nom. Qwest Corporation v. Federal Communications Commission,* 2007 U.S. App. 6755 (D.C. Cir. 2007) ("*Omaha Forbearance Order").* The D.C. Circuit did not address the issue of the inconsistency between the Commission's current interpretation of Section 251(c) and the

Section 251(d) provides that the Commission "within 6 months after February 8, 1996 shall complete all actions necessary to establish regulations to implement the requirements of this section." In contrast, in Section 10(d), Congress prohibited the Commission from forbearing from applying the requirements of Section 251(c) until it had determined that those requirements had been "fully implemented." If Congress had intended to give the Commission authority to forbear from applying Section 251(c) as soon as rules implementing Section 251(c) had been adopted and gone into effect, there would be nothing for the Commission to "determine" in terms of whether the requirements of Section 251(c) had been fully implemented. Moreover, the use of the adverb "fully" to modify "implemented" in Section 10(d) clearly shows that Congress had more in mind than merely adopting regulations to implement the requirements of Section 251. *See Rusello v. U.S.*, 464 U.S.16, 23 (1983) ("Where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). The Commission itself previously agreed with this interpretation and so represented to the D.C. Circuit. In *ASCENT v. FCC*, the Court noted that

> But the Commission may not forbear from applying the requirements of Section 251(c). . ."until it determines that those requirements have been fully implemented." Because those requirements have not been fully implemented here, the FCC (*as it concedes*) may not forbear.

235 F. 3d 662, 666 (D.C. Cir. 2001) (emphasis added).

Commission's prior rulings that state commissions, ILECs and competitive carriers all have a role to play in the implementation of Section 251(c) after finding that petitioners had failed to adequately raise the issue before the Commission. *Id.* at 21-22.

The Commission must adhere to its own precedent or explain its reasons for reversing course.[3] In adopting regulations pursuant to Section 251(d), the Commission correctly found that the adoption of rules was only the start of the process toward full implementation of Section 251(c) and that full implementation would require action not only by the Commission, but also by the state commissions, the ILECs and competitors. Specifically, in the *Local Competition Order* the Commission concluded that its adoption of Section 251(c) rules was merely "the initial measure[s] *that will enable the states and the Commission to begin to implement* sections 251 and 252."[4] It further described its rules as a means to "facilitate administration of section 251 and 252…."[5] Thus, it is clear that the Commission – consistent with the statutory language - viewed its rules as the means, not the end, to full implementation of Section 251. The Commission viewed implementation of Section 251(c) as involving substantial activity by the Commission, the states, and the ILECs well beyond the effective date of rules established by the FCC. Indeed, it found that "Section 252 generally sets forth the procedures that state commissions, incumbent LECs and new entrants must follow to implement the requirements of Section 251 and establish specific interconnection arrangements."[6] *See also AT&T v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999) ("It is the states that will

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[3] *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977). *See also*, *Columbia Broad. Sys., Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971)(FCC must explain its reasons for reversing its course; enumerate factual differences between similar cases; and explain the relevance of those differences to the purposes of the Act.)

[4] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) at ¶ 6 ("*Local Competition Order*").

[5] *Id.* at ¶ 41.

[6] *Id.* at ¶ 116.

apply the [Commission's TELRIC pricing] standards and implement that methodology determining the concrete results in particular circumstances.")

The Commission previously has found that the states have a substantial role to play in the full implementation of Section 251. It interpreted Section 251 as "creating parallel jurisdiction for the FCC and the states"[7] and as involving an "allocation of responsibilities" [8] between it and the states. The Commission, for example, found that, while some of its rules may be self-executing, "in many instances, however, the rules [it] establish[es] call on the states to exercise significant discretion and to make critical decisions through arbitrations and development of state-specific rules."[9] It also found that in some cases its rules only "identify broad principles and leave to the states the determination of what specific requirements are necessary to satisfy those principles."[10]

Indeed, the Commission concluded that it was Congress' intent for states to play a role in the implementation of Section 251. According to the Commission, "Congress envisioned complementary and significant roles for the Commission and the states with respect to the rates for section 251 services, interconnection, and access to unbundled elements."[11] If Congress intended the states to have a significant role in implementing the statutory provision, then it could not have intended that the Commission's action in promulgating rules and the passage of the effective date of those rules alone to be

[7] *Id.* at ¶ 85.

[8] *Id.* at ¶ 41.

[9] *Id.*

[10] *Id.* at ¶ 67.

[11] *Id.* at ¶ 111.

sufficient to deem Section 251(c) "fully implemented." The Commission must consult with the state commissions on a state by state basis to assess whether Section 251(c) has been fully implemented, rather than making a nationwide determination.

The Commission also recognized the important role the ILECs have in the implementation of Section 251. In particular, the Commission found that the ILECs have certain obligations under Section 251.[12] In the *UNE Remand Order,* the Commission stated that "[b]ecause unbundled network elements have not been made fully available to competitors as the Commission expected in 1996, we do not yet know the extent to which competition will develop once all of the unbundling rules are actually *implemented by the incumbent LECs.*"[13] In the *Triennial Review Remand Order,* released just seven months before the adoption of the *Omaha Forbearance Order,* the Commission again recognized the role that ILECs and CLECs must play in implementing Section 251:

> We expect that incumbent LECs and competitive carriers will *implement* the Commission's [unbundling determinations] as directed by Section 252 of the Act. Thus, carriers must *implement* changes to their interconnection agreements consistent with the conclusions in this Order. . . .Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to *implement* our rule changes.[14]

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[12] *Id.* at ¶¶ 54, 307; *see also AT&T v. Iowa Utilities Board,* 525 U.S. at 371 (under the Telecommunications Act of 1996, ILECs are subject to a host of duties intended to facilitate market entry, including the duty to share their networks with competitors).

[13] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 15 FCC Rcd 3696 (1999) at ¶ 11, *reversed and remanded on other grounds sub nom. USTA v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("*UNE Remand Order*") (emphasis added).

[14] *In the Matter of Unbundled Access to Network Elements*, WC Docket 04-323, Order on Remand, FCC 04-290 at ¶ 233 (rel. Feb. 4, 2005) (emphasis added).

For the Commission to conclude less than a year later that ILECs do not have a role in implementing Section 251(c)[15] without explanation or analysis as to why it was abandoning its original interpretation of the statute fails to pass the reasoned decision making test. As the Court stated in *Columbia Broad. Sys., Inc. v. FCC*, 454 F.2d at 1026:

> [W]hen an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.
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> Faced with two facially conflicting decisions, the Commission was duty bound to justify their co-existence. The Commission's utter failure to come to grips with this problem constitutes an inexcusable departure from the essential requirement of reasoned decision making.

Section 251 cannot be "fully implemented" until Verizon fully satisfies its unbundling and other market-opening obligations imposed by the statute. As described by Cavalier, Verizon has not fully met those obligations, "but instead has sought to thwart the market-opening requirements of § 251(c) at every turn."[16] Without input from the affected state commissions and the competitors for whom Section 251(c) was designed to facilitate entry, the Commission cannot possibly determine that Section 251(c) has been "fully implemented" simply because it has adopted implementing regulations and those regulations have gone into effect.

The Commission's determination in the *Omaha Forbearance Order* that ILECs do not have a role in implementing Section 251(c) not only directly contradicts its prior precedent, but it is also nonsensical. Section 251(c) imposes specific duties on ILECs, including the duty to provide to requesting telecommunications carriers nondiscriminatory access to unbundled network elements. The Commission does not

[15] *Omaha Forbearance Order* at¶ 54.

[16] Opposition of Cavalier at 5-8.

have the ability to provide requesting carriers access to unbundled network elements – *i.e.,* to implement a duty imposed on third parties -- only the ILECs do, as the Commission confirmed in the *UNE Remand Order*. The Commission cannot reverse its interpretation of Section 251(c) without acknowledging its prior precedent and providing a full explanation as to why that interpretation was incorrect. Although the Commission held in the *Omaha Forbearance Order* that it is the only entity that "implements" Section 251 and that Section 251(c) has been "fully implemented" for all incumbent LECs nationwide because the rules it has promulgated have gone into effect[17] and this holding cannot be reconciled with its prior interpretation of the statute, it provided no explanation for its departure from precedent. Reading the statute to mean that the Commission could grant forbearance from Section 251(c) as soon as its implementing regulations became effective – before any action with regard to those regulations may have been taken – eviscerates the very purpose of the rules and the statutory provision. The Commission must provide a reasoned explanation as to why this departure from prior precedent is analytically and legally sound.

II. Verizon's Characterization of Competition in the Six MSAs is Greatly Exaggerated

Verizon identified cable operators as its biggest competitors in each of the six MSAs. The cable operators Verizon identified have asserted that Verizon greatly overstated the geographic areas and the number of customers they serve, particularly in the enterprise market.[18] Verizon's characterization of the state of competition is also

[17] *Omaha Forbearance Order* at ¶ 53.

[18] *See* Comments of Cox communications, Inc. at 24-28; Comments of Time Warner Cable; Comments of the National Cable Telecommunications Association at 5-10; Comments of Comcast Corporation at 3-5.

called into question by recent developments in its patent litigation with over-the-top VoIP provider Vonage and the comments of the cities and public utility commissions.

Verizon relies on the allegedly formidable competition it faces from over-the-top VoIP providers, most notably Vonage.[19] At the very time it made these claims, Verizon was pursuing a patent infringement lawsuit against Vonage relating, among other things, to a key technology that Vonage uses to connect VoIP calls to the public switched telephone network. According to news reports, a jury found in Verizon's favor on its patent infringement claims on March 8, 2007. The judge subsequently enjoined Vonage from using Verizon's technology, but entered a partial stay of the injunction to allow Vonage to continue to serve its existing customers pending its appeal of the jury's decision. The injunction, however, bars Vonage from using the technology to serve new customers, which means that Vonage will not only not be able to grow its customer base, but it will also not be able to replace any customers lost to churn. Vonage was able to obtain an emergency stay of the entire injunction pending a ruling by the U.S. Court of Appeals for the Federal Circuit on Vonage's motion for a permanent stay pending the resolution of its appeal. Vonage has recently conceded that it does not have a work around for the Verizon technology.[20] If Vonage is unable to obtain a permanent stay of the injunction, its prospects for remaining in business appear dim.[21] Despite the fact that

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[19] *See e.g.,* Verizon's Pittsburgh Petition at 13.

[20] Leslie Cauley, "Vonage: No Tech 'Workaround,'" USA Today, April 15, 2007 available at http://www.usatoday.com/money/industries/telecom/2007-04-15-vonage-usat_N.htm.

[21] Amol Sharma, "Vonage Says Patent Suits Could Lead to Bankruptcy," Wall Street Journal at A2, April 18, 2007 (patent litigation could cause loss of customers and

Verizon was, and continues to be, engaged in litigation to shut Vonage's VoIP business down (and any spillover effects onto other VoIP providers remain to be seen), it nonetheless characterizes VoIP providers, and Vonage in particular, as "an added source of competitive discipline on Verizon," noting that Vonage alone is "adding an average of more than 22,000 subscribers each week."[22] Clearly, Verizon's claims of the competitive threat posed by Vonage and other over-the-top VoIP providers must be rejected.[23]

The fact that the second largest wireline telephone company in the nation and the largest wireline telephone company in its serving territories controls the technology necessary to pass VoIP calls to the PSTN and is taking legal action to prohibit the use of that technology by competing VoIP providers speaks volumes about Verizon's dominance of the voice market and its willingness to use that dominance to squelch competition. Verizon's apparent reluctance to license the technology used to connect VoIP calls to the PSTN to competitors[24] provides another example of Verizon's efforts to limit competitors' access to its bottleneck network facilities and technologies to discourage the development and promotion of competition.[25]

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distribution channels, employee layoffs, continued decline in share price and inability to meet debt obligations).

[22] *See e.g.,* Verizon's Boston Forbearance Petition at 13.

[23] In any event, as COMPTEL demonstrated in its Oppositions to Verizon's Petitions, Verizon did not provide any reliable evidence that either VoIP or wireless is a substitute for wireline telephone service and, therefore, that neither wireless nor VoIP should be considered to be in the same product market as wireline voice for purposes of evaluating the extent of competition in the six MSAs. See COMPTEL's Oppositions to Verizon Petitions at 34-35.

[24] Anne Broache, "Vonage, Verizon Spar In Court Over Patents, CNET News.com, February 27, 2007, available at http://news.com.com/2100-1036_3-6162747.html.

[25] See *e.g.*, Cavalier Opposition at 5-8.

Commenters, including the government entities that felt compelled to come forward to object to further deregulation of Verizon, persuasively showed that absent unbundling and dominant carrier regulation, competition sufficient to serve as a check on Verizon's retail and wholesale rates, terms and conditions of service and to protect consumers simply does not exist in the six MSA for which Verizon seeks forbearance. For example, the City of New York noted that it had negotiated a contract with MCI for voice and data services prior to MCI's merger with Verizon. When the merger closed prior to the contract being finalized, Verizon repudiated the terms negotiated by MCI and offered the City the same services at higher prices and on less favorable terms. In the absence of an alternative provider, the City was forced to accept Verizon's terms.[26] The New York Attorney General recently informed the New York Public Service Commission that Verizon's repair service was "woefully inadequate" on Long Island and in the borough of Queens, both of which are encompassed within the New York MSA.[27] These experiences clearly are not indicative of a competitive market place. If the Commission were to eliminate Verizon's unbundling obligations, the alternative choices that are available to New York consumers would be substantially curtailed.

The Delaware Public Service Commission and the Delaware Division of the Public Advocate expressed concern that the competitive choices currently enjoyed by citizens of Delaware would be jeopardized if the Commission were to forbear from

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[26] Comments of the City of New York at 3-4.

[27] Richard J. Dalton, "Cuomo Seeks Verizon Rebates, Customers Should Be Compensated For Poor Service, Attorney General Says," Newsday.com, April 18, 2007, available at http://www.newsday.com/business/ny-bzveri0418,0,7844546.story?coll=ny-business-leadheadlines

enforcing Verizon's unbundling obligations in the Philadelphia MSA.[28] Similarly, the Pennsylvania Public Utility Commission argued that granting Verizon forbearance from the obligation to provide unbundled loops will deny residential customers access to competitive services at reasonable prices.[29] The City of Philadelphia also showed that eliminating Verizon's unbundling obligations will eliminate competition for the vast majority of Philadelphia residential and business consumers who still receive voice and data service over copper loops.[30] The Virginia State Corporation Commission related how it had imposed certain conditions intended to protect competitive pricing in the wholesale special access market on its approval of the Verizon/MCI merger. After consummating the merger, Verizon sued to invalidate those conditions[31] presumably so that it could raise the wholesale prices that MCI had been charging before the merger.

Verizon's conclusory and unsupported allegations of the intense competition it faces and its air of entitlement to forbearance relief despite its failure to produce wire center specific evidence of competitive alternatives in either the retail or wholesale market must be rejected. The record developed in this proceeding shows that far from promoting competitive market conditions and enhancing competition among providers of telecommunications services, granting Verizon forbearance from its statutory obligations

[28] Comments of the Delaware Public Service Commission and the Delaware Division of the Public Advocate at 4-5.

[29] The Comment of The Pennsylvania Pubic Utility Commission at 5.

[30] Comments of the City of Philadelphia at 8.

[31]Comments of the Virginia State Corporation Commission at 4-5. Verizon's Complaint was dismissed with prejudice by the United States District Court for the Eastern District of Virginia, Richmond Division, on March 27, 2007. See *MCIMetro Access Transmission Services of Virginia, Inc. v. Christie*, Civil Action Number 3:06CV740, Memorandum Opinion (E.D. Va. March 27, 2007).

to provide unbundled access to loops and transport on just, reasonable and nondiscriminatory rates, terms and conditions and from dominant carrier regulation will stifle competition. Further, it will likely drive some competitors from the market altogether and result in higher prices and less favorable terms for consumers of telecommunications services.

III. Grant of Verizon's Petitions Would Adversely Impact Broadband Deployment and Availability

Elimination of Verizon's obligation to provide access to unbundled loops will also undermine competition in the provision of broadband services. As the record reflects, competitors use high speed DSL transmission services provided over unbundled loops to provision very high speed data services to consumers.[32] These competitors combine broadband transmission provided over UNE loops with their own electronics and backbone networks to offer consumers broadband alternatives different than those provided by the ILECs and cable operators. As a result, continued access to UNE loops remains an important part of ensuring the reasonable, timely and affordable deployment of advanced broadband services pursuant to Section 706 of the 1996 Telecommunications Act.

Verizon has not shown that forbearance from enforcing the unbundling obligations imposed by Section 251(c) will not adversely affect competition in the market for broadband services. Nor has Verizon demonstrated that without TELRIC pricing, it will make unbundled loops available at just, reasonable and nondiscriminatory rates,

[32] *See e.g.,* Opposition of EarthLink, Inc. and New Edge Networks, Inc. to the Petitions of Verizon Telephone Companies for Forbearance, at 4-8, 10; Opposition of Cavalier at 2-3.

terms and conditions. Although the Commission made a predictive judgment that Qwest would continue to make wholesale loops and transport available at competitive rates and terms in Omaha after forbearance was granted,[33] that prediction has not come true, with the result that at least one competitor has announced its intention to exit the market.[34] The Commission must learn from this experience and avoid the making of predictive judgments that are not based on hard evidence.

As EarthLink points out, removing access to or competitive pricing for the unbundled elements competitors use as inputs for their retail broadband offerings will eliminate choice and increase concentration in the already highly concentrated markets for broadband Internet access.[35] There is nothing in the record that would indicate that the Omaha experience – *i.e.*, fewer choices and less competition -- is not likely to be repeated in other MSAs where the Commission prematurely grants forbearance from Section 251(c) By maintaining access to and TELRIC pricing for unbundled elements, the Commission can ensure the preservation of at least some competitive alternatives to Verizon and cable company broadband in the six MSAs.

CONCLUSION

For the foregoing reasons and those set forth in its Oppositions to Verizon's Petitions as well as the entire record herein, the Commission should deny Verizon's

[31] *Omaha Forbearance Order* at ¶ 83.

[34] See Letter from Chris MacFarland, Group Vice President, McLeod USA, to Marlene H. Dortch dated December 15, 2006 filed in WC Docket No. 05-281.

[35] *See* EarthLink Opposition at 38-39.

Petitions for Forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach MSAs.

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